



## Final Regulation Agency Background Document

<b>Approving authority name</b>	State Air Pollution Control Board
<b>Primary action</b>	Article 40, 9 VAC 5-40
<b>Secondary action(s)</b>	None
<b>Regulation title</b>	Regulations for the Control and Abatement of Air Pollution
<b>Action title</b>	Open Burning H03
<b>Document preparation date</b>	June 29, 2006

This information is required for executive review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act, Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief Summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also alert the reader to changes made to the regulation since publication of the proposed.*

The regulation provides for the control of open burning and use of special incineration devices. It specifies the materials that may and may not be burned, the conditions under which burning may occur, and the legal responsibilities of the person conducting the burning. The regulation permits open burning or the use of special incineration devices for disposal of clean burning construction waste, debris waste and demolition waste but provides for a seasonal restriction during June, July and August in the Northern Virginia, Richmond and Hampton Roads volatile organic compound (VOC) emissions control areas. It also provides a model local ordinance for cities and counties that wish to adopt their own legally enforceable mechanisms to control burning in lieu of relying on the state's regulatory program.

The regulation is being modified to extend the seasonal restriction to all VOC emissions control areas and expand the seasonal restriction in those areas from June, July and August to include May and September. Year round restrictions have been placed on open burning or use of special incineration devices such that disposal is limited to clean burning waste and debris waste. Modifications have also been made to ensure the regulation is consistent with existing incinerator regulations of the Board and waste management regulations.

## Statement of Final Agency Action

*Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.*

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On June 21, 2006 the State Air Pollution Control Board adopted final amendments to regulations entitled "Regulations for the Control and Abatement of Air Pollution", specifically Open Burning (9 VAC Chapter 40, Article 40). The regulation amendments are to be effective as specified by the Administrative Process Act.

## Legal Basis

*Please identify the section number and provide a brief statement relating the content of the statutory authority to the specific regulation adopted. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to adopt the regulation.*

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Section 10.1-1308 of the Virginia Air Pollution Control Law (Title 10.1, Chapter 13 of the Code of Virginia) authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling and prohibiting air pollution in order to protect public health and welfare. Written assurance from the Office of the Attorney General that the State Air Pollution Control Board possesses the statutory authority to promulgate the proposed regulation amendments is available upon request.

## Purpose

*Please provide a statement explaining the rationale or justification of the proposal as it relates to the health, safety or welfare of citizens.*

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The purpose of the regulation is (i) to limit or, in some instances, prohibit open burning and to establish requirements to restrict emissions of volatile organic compounds (VOCs) and nitrogen oxides (NOx) during the peak ozone season to the level necessary for the protection of public health and welfare; and (ii) to provide guidance to local governments on the adoption of ordinances to regulate open burning. The proposed amendments are being made to reduce emissions of volatile organic compounds (VOCs) and nitrogen oxides (NOx) from open burning and special incineration devices in Virginia's emissions control areas in order to attain and maintain the federal health-based air quality standard for ozone.

## Substance

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All Changes Made in this Regulatory Action" section.*

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1. Prohibit the use of special incineration devices during the summer burning ban. (A special incineration device is a pit incinerator, conical or teepee burner, or any other device specifically designed to provide good combustion performance.)

2. Expand the summer burning ban from three months to five.
3. Expand the summer ban into the new volatile organic compound emissions control areas.
4. Resolved definition conflicts between the regulations of the Waste Management Board and this regulation.
5. Integrated air curtain destructor requirements with incinerator rules of the Board.

## Issues

*Please identify the issues associated with the proposed regulatory action, including: (1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; (2) the primary advantages and disadvantages to the agency or the Commonwealth; and (3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.*

1. Public: The summertime ban will facilitate progress towards attaining the emissions reduction goals of the ozone attainment plans, thus providing a mechanism to remedy both a public welfare problem and a public health problem. The summertime ban on burning in the volatile organic compound emissions control areas will have a positive health effect for the Virginians in those areas who suffer from some form of respiratory ailment. On the other hand, Virginians outside these areas may suffer more than they currently do if their local governments fail to take upon themselves the responsibility for developing control programs for open burning. However, the summertime ban may exacerbate a problem with illegal stump dumps in localities just outside of the volatile organic compound emissions control areas. Contractors that are not permitted to burn will incur significant additional costs for disposal during the summertime ban months. This, in turn, may result in efforts to find "less expensive" means of disposal; and unfortunately, the adjacent, more rural counties that don't have fire marshals may incur the additional problems of illegal dumps.

2. Department: The regulation will provide the Department with an essential tool for managing the frequent open burning conducted throughout the Commonwealth, particularly in suburban areas, in that if the Commonwealth did not take responsibility for the maintenance of the air quality standards, citizens might force local governments to enforce standards within each community to ensure maintenance of the quality of life. While the regulation results in some inconsistency between volatile organic compound emissions control areas and other areas, the Commonwealth's failure to act might exacerbate the inconsistency and impose an additional financial burden upon local governments. The department will be able to devote its scarce resources to control programs more directly linked to the attainment of legally mandated standards and will thus save both staff time and money. The Department will also benefit from the consistency between the regulations of the Board and those of the Waste Management Board. The department will experience no disadvantages by the implementation of this regulation.

## Changes Made Since the Proposed Stage

*Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.*

Section number	Requirement at proposed stage	What has changed	Rationale for change
5610 definitions			
"Clean wood"	Untreated wood or wood products	Added a comma between painted and stained	Technical correction
"Demolition waste"	Solid waste	Struck "and"; added "or", "or both"	Added for clarity
"Junkyard"	Place of business for selling junk or used automobiles	Changed "fills" to "landfills"	Technical correction
"Sanitary Landfill"	Burial facility for the disposal of household and other types of solid waste	Added commas in the phrase "construction, demolition or debris waste"	Technical correction
5620 B	Prohibits burning for the disposal of rubber tires, asphalt, or petroleum based materials	Changed the term "disposal" to "the destruction"	Revised to prevent confusion with solid waste regulations
5620 C	Prohibits burning for the disposal of hazardous waste	Changed the term "disposal" to "the destruction"	Revised to prevent confusion with solid waste regulations
5620 D	Prohibits burning for the disposal of commercial or industrial waste	Changed the term "disposal" to "destruction"	Revised to prevent confusion with solid waste regulations
5620 E	Requires compliance with other applicable laws	Subsection moved to 5630, Permissible open burning	Relocated for clarity
5620 F	Stipulates that any burning must be done in accordance with the regulations of the Waste Management Board	Subsection moved to 5630, Permissible open burning. Changed the term "disposal" to "destruction" and changed the term "disposal" to "destroyed"	Relocated for clarity. Revised to prevent confusion with solid waste regulations
5620 G	Requires that in the case of an air pollution episode or emergency all burning will terminate	Subsection reformatted; changed the "G" to "E" due to moving 5620 E and F to 5630	Technical correction
5630 A	Identifies the conditions under which open burning can occur	Reformatted by adding "A" and changed the subsection reference from "G" to "E" due to the reformatting of subsections 5620 E and F cited above	Technical correction
5630 A 1 b	Permits burning for the disposal of debris caused by natural disasters provided certain criteria are met	Changed the term "disposal" to "destruction"	Revised to prevent confusion with solid waste regulations

5630 A 1 c	Permits burning for the disposal of infested animal or plant life	Changed the term “disposal” to “destruction” and added the phrase “on site”	Revised to prevent confusion with solid waste regulations and to add clarity
5630 A 5	Permits burning for the disposal of leaves, tree, and garden trimmings on private property	Changed the term “disposal” to “destruction” and added the phrase “on site”	Revised to prevent confusion with solid waste regulations and to add clarity
5630 A 6	Permits burning for the disposal of household waste	Changed the term “disposal” to “destruction” and added the phrase “on site”	Revised to prevent confusion with solid waste regulations and to add clarity
5630 A 8	Permits year-round burning or the use of special incineration devices for disposal of clean burning construction waste, debris waste and demolition waste but provides for a seasonal restriction during June, July and August in volatile organic compound (VOC) emissions control areas	Changed the term “disposal” to “destruction” and added the phrase “on site”. Reinstated previously stricken language.	Revised to prevent confusion with solid waste regulations and to add clarity
5630 A 10	Permits, on the site of local landfills, year-round burning or the use of special incineration devices for disposal of clean burning construction waste, debris waste and demolition waste but provides for a seasonal restriction during June, July and August in volatile organic compound (VOC) emissions control areas	Changed the term “disposal” to “destruction” and added the phrase “on site”	Revised to prevent confusion with solid waste regulations and to add clarity
5630 B	Requires compliance with applicable laws, ordinances or regulations of other governing entities having jurisdiction	Subsection moved from 5620, Open burning prohibitions	Relocated for clarity

5630 C	Stipulates that any burning must be done in accordance with the regulations of the Waste Management Board	Subsection moved from 5620, Open burning prohibitions	Relocated for clarity
5631 A	Permits year-round burning for certain agricultural practices and stipulates the conditions for doing so	Reformatted by changing the subsection reference from "G" to "E" due to the reformatting of subsections 5620 E and F cited above	Technical correction
5631 C 3	Permits year-round burning of fertilizer and chemical containers	Added the word "empty"	Added for clarity
5641 A 1	Addresses local ordinances	Added the phrase "relating to air pollution and"	Added for consistency with the Code of VA
5641 B 1 d	Addresses the use of a waiver	Struck "9 VAC 5-40-5640" and replaced it with "9 VAC 5-40-5645"	Technical correction
5641 B 6	Addresses local ordinances	Struck "9 VAC 5-20-60" and replaced it with "9 VAC 5-170-150"	Technical correction
<b>5641 C Model Ordinance</b>			
Section (000-3)	Definitions	Added or revised as necessary to coincide with state program definitions in section 5610 C	Technical correction
Section (000-4)	Prohibitions on open burning	Revised as necessary to coincide with section 5620 pertaining to the use of the terms "disposal" and "destruction"	Revised to prevent confusion with solid waste regulations
Section (000-6)	Permissible open burning	Revised as necessary to coincide with section 5630 pertaining to the terms "disposal", "destruction" and the phrase "on site"	Revised to prevent confusion with solid waste regulations and to add clarity
Section (000-7)	Use of special incineration devices	Changed the term "disposal" to "destruction"	Revised to prevent confusion with solid waste regulations and to add clarity

**Public Comment**

*Please summarize all public comment received during the public comment period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.*

A summary and analysis of the public testimony, along with the basis for the decision of the Board, is attached.

## All Changes Made in this Regulatory Action

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.*

Current section number	Current requirement	Proposed change and rationale
5600 A	Overall applicability	Technical correction
5600 D	None	Added to ensure consistency with the incinerator regulations of the Board. Specifically, Article 45 (Commercial/Industrial Solid Waste Incinerators), Article 46 (Small Municipal Waste Combustors) and Article 54 (Large Municipal Waste Combustors)
5610 definitions		
"Air curtain incinerator"	None	Added to coincide with new applicability requirement in section 5600 D
"Clean burning waste"	Current definition uses opacity requirement; difficult to enforce	Revised to accommodate changes to section 5630 8 and 10
"Clean lumber"	None	Added to accommodate new definition of "clean burning waste"
"Clean wood"	Untreated wood or wood products	Added to accommodate new definition of "clean burning waste"
"Commercial waste"	Definition does not exclude manufacturing or construction waste	Revised to ensure consistency with solid waste regulations
"Construction waste"	Defines a certain type of solid waste in very general terms	Revised to ensure consistency with solid waste regulations
"Debris waste"	Defines solid waste in very general terms	Revised to ensure consistency with solid waste regulations
"Demolition waste"	Defines a certain type of solid waste	Revised for clarity
"Garbage"	Defines waste in very general terms	Revised to ensure consistency with solid waste regulations
"Hazardous waste"	Defines waste in very general terms	Revised to ensure consistency with hazardous waste regulations
"Household waste"	Defines household refuse	Name changed and revised to ensure consistency with solid waste regulations
"Industrial waste"	Defines waste generated at industrial or manufacturing facilities	Revised to ensure consistency with solid waste regulations
"Junkyard"	Place of business for selling junk or used automobiles	Technical correction
"Open burning"	Defines activity in very general terms	Revised to ensure consistency with solid waste regulations
"Open pit incinerator"	Uses the term destructors instead of incinerators	Revised to coincide with new applicability requirement in section 5600 D
"Refuse"	Defines waste in very general terms	Revised to ensure consistency with solid waste regulations
"Sanitary landfill"	Defines what material may be disposed of in the landfill	Revised to ensure consistency with solid waste regulations

	excluding construction demolition debris	
"Special incineration device"	Specifically designed equipment to provide good combustion	Technical correction
"Wood waste"	None	Added to accommodate new definition of "clean burning waste"
"Yard waste"	None	Added to accommodate new definition of "clean burning waste"
5620 B	Prohibits the burning of rubber tires, asphalt, or petroleum bases materials	Revised to prevent confusion with solid waste regulations
5620 C	Prohibits the burning of hazardous waste	Revised to prevent confusion with solid waste regulations
5620 D	Prohibits burning for salvage operations and the disposal of commercial or industrial waste	Revised to prevent confusion with solid waste regulations
5620 E	Requires compliance with other applicable laws	Subsection moved to 5630 to improve clarity
5620 F	Requires that any burning must be done in compliance with Waste Management Board regulations	Subsection moved to 5630 to improve clarity and revised to prevent confusion with solid waste regulations
5620 G	Requires that in the case of an air pollution episode or emergency all burning will terminate	Subsection reformatted; changed the "G" to "E" due to moving 5620 E and F to 5630
5630 A	Identifies the conditions under which open burning can occur	Reformatted due to the reformatting of subsections 5620 E and F cited above
5630 A 1 a	Permits the destruction of explosive materials provided certain criteria are met	Revised to indicate that a hazardous waste permit may be required
5630 A 1 b	Permits the destruction of debris caused by floods, tornadoes, hurricanes or other natural disasters provided certain criteria are met	Revised to indicate that a solid waste permit may be required
5630 A 1 c	None	Added to permit the destruction of animal or plant life that is infested, or reasonably believed to be infested, by a pest or disease
5630 A 2	Permits the destruction of buildings for fire fighter training	Relocated from section 5630 8 for clarity
5630 A 5	Permits the destruction of leaves, tree, and garden trimmings on private property	Revised to prevent confusion with solid waste regulations and to add clarity
5630 A 6	Permits the destruction of household waste	Revised to prevent confusion with solid waste regulations and to add clarity
5630 A 7	Permits the destruction of any combustible liquid or gaseous material by burning	Revised to indicate that hazardous waste permits may be required

	in a flare or flare stack	
5630 A 8	Permits year round open burning or the use of special incineration devices for disposal of clean burning construction waste, debris waste and demolition waste but provides for a seasonal restriction during June, July and August in the Northern Virginia, Richmond and Hampton Roads volatile organic compound (VOC) emissions control areas	Revised year round restriction on open burning or use of special incineration devices to limit disposal to clean burning waste and debris waste. Extended the seasonal restriction to all VOC emissions control areas and expanded the seasonal restriction in those areas from June, July and August to include May and September.
5630 A 10	Permits, on the site of local landfills, year round open burning or the use of special incineration devices for disposal of clean burning construction waste, debris waste and demolition waste but provides for a seasonal restriction during June, July and August in the Northern Virginia, Richmond and Hampton Roads volatile organic compound (VOC) emissions control areas	Revised year round restriction on open burning or use of special incineration devices to limit disposal to clean burning waste and debris waste. Extended the seasonal restriction to all VOC emissions control areas and expanded the seasonal restriction in those areas from June, July and August to include May and September.
5630 B	None	Subsection moved from 5620 to improve clarity
5630 C	None	Subsection moved from 5620 to improve clarity
5631 A	Permits year-round burning for certain agricultural practices and stipulates the conditions for doing so	Reformatted by changing the subsection reference from “G” to “E” due to the reformatting of subsections 5620 E and F cited above
5631 C 1	Permits year-round burning for certain agricultural practices	Revised to include the destruction of diseased vegetation as an agricultural practice
5631 C 3	Permits year-round burning for certain agricultural practices	Revised to prevent the destruction of fertilizer and chemical products via burning
5641 A 1	Addresses local ordinances	Revised to ensure consistency with the Code of VA
5641 B 1 d	Addresses the use of a waiver	Technical correction
5641 B 6	Addresses local ordinances	Technical correction
5641 C Model Ordinance		
Section (000-3)	Definitions	Added or revised as necessary to coincide with state program definitions in section 5610
Section (000-4)	Prohibitions on open burning	Revised as necessary to coincide with section 5620 pertaining to the use of the terms “disposal” and “destruction” to ensure consistency with solid waste regulations
Section (000-6)	Permissible open burning	Revised as necessary to coincide with

		section 5630 pertaining to the terms “disposal”, “destruction” and the phrase “on site” to ensure consistency with solid waste regulations
Section (000-7)	Use of special incineration devices for destruction of debris waste	Changed the term “disposal” to “destruction” to ensure consistency with solid waste regulations

## Regulatory Flexibility Analysis

*Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: (1) the establishment of less stringent compliance or reporting requirements; (2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; (3) the consolidation or simplification of compliance or reporting requirements; (4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposal; and (5) the exemption of small businesses from all or any part of the requirements contained in the proposal.*

Most contractors within the Commonwealth meet the criteria for small businesses; however, these contractors cannot be exempt from the regulations since they conduct practically all of the large scale open burning throughout the Commonwealth, including the VOC control areas. Since burning will be prohibited in the VOC control areas during the summer months, other means of disposal will be required. However, very little recordkeeping, compliance or reporting requirements are mandated within the regulation. Local governments may require notification or other requirements prior to burning or commencing operations.

## Legal Requirements

*Please identify the state and/or federal source of the legal requirements that necessitate promulgation of the proposal, including: (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal requirements and the extent to which the requirements are mandatory or discretionary.*

### Promulgating Entity

The promulgating entity for this regulation is the State Air Pollution Control Board.

### Identification of Specific Applicable Federal Requirements

Ozone is formed by complex series of reactions between nitrogen oxides (NOx) and volatile organic compounds (VOCs) under the influence of solar ultraviolet radiation (sunlight). Ozone shows a very strong diurnal (daily) and seasonal (April to October) cyclical character. Ozone injures vegetation, has adverse effects on materials (rubber and fabrics), and is a pulmonary irritant that affects respiratory mucous membranes, lung tissues, and respiratory functions.

The original ozone air quality standard that was the focus of air quality planning requirements after the promulgation of the 1990 Amendments to the Clean Air Act was a 1-hour standard. Since then, EPA has

promulgated a new 8-hour ozone air quality standard, and associated designation of nonattainment areas, which necessitates the initiation of new plans and regulatory actions.

40 CFR Part 81 specifies the designations of areas made under § 107(d) of the CAA and the associated nonattainment classification (if any) under § 181 of the CAA or 40 CFR 51.903(a), as applicable. On April 30, 2004 (69 FR 23858), EPA published its final decision as to the 8-hour nonattainment areas and associated classifications. The new designations are effective June 15, 2004. The Commonwealth of Virginia designations are in 40 CFR 81.347.

40 CFR Part 51, Subpart X, contains the provisions for the implementation of the 8-hour ozone NAAQS, along with the associated planning requirements. On April 30, 2004 (69 FR 23951), EPA published phase 1 of its final rule adding Subpart X to 40 CFR Part 51. Specifically, 40 CFR 51.903(a) sets forth the classification criteria and nonattainment dates for 8-hour ozone nonattainment areas once they are designated as such under 40 CFR Part 81. The remainder of the planning requirements (phase 2) will not be made known until summer 2005.

The state regulations established VOC and NO<sub>x</sub> emissions control areas to provide the legal mechanism to define the geographic areas in which Virginia implements control measures to attain and maintain the air quality standards for ozone. The emissions control areas may or may not coincide with the nonattainment areas, depending on the necessity of the planning requirements.

#### General Federal Requirements

Sections 109 (a) and (b) of the Clean Air Act (CAA) require EPA to prescribe primary and secondary air quality standards to protect public health and welfare, respectively, for each air pollutant for which air quality criteria were issued before the enactment of the 1970 Clean Air Act. These standards are known as the National Ambient Air Quality Standards (NAAQS). Section 109 (c) requires EPA to prescribe such standards simultaneously with the issuance of new air quality criteria for any additional air pollutant. The primary and secondary air quality criteria are authorized for promulgation under Section 108.

Once the NAAQS are promulgated pursuant to § 109, § 107(d) sets out a process for designating those areas that are in compliance with the standards (attainment or unclassifiable) and those that are not (nonattainment). Governors provide the initial recommendations but EPA makes the final decision. Section 107(d) also sets forth the process for redesignations once the nonattainment areas are in compliance with the applicable NAAQS.

Section 110(a) of the CAA mandates that each state adopt and submit to EPA a plan which provides for the implementation, maintenance, and enforcement of each primary and secondary air quality standard within each air quality control region in the state. The state implementation plan shall be adopted only after reasonable public notice is given and public hearings are held. The plan shall include provisions to accomplish, among other tasks, the following:

(1) establish enforceable emission limitations and other control measures as necessary to comply with the provisions of the CAA, including economic incentives such as fees, marketable permits, and auctions of emissions rights;

(2) establish schedules for compliance;

(3) prohibit emissions which would contribute to nonattainment of the standards or interference with maintenance of the standards by any state; and

(4) require sources of air pollution to install, maintain, and replace monitoring equipment as necessary and to report periodically on emissions-related data.

40 CFR Part 50 specifies the NAAQS: sulfur dioxide, particulate matter, carbon monoxide, ozone (its precursors are nitrogen oxides and volatile organic compounds), nitrogen dioxide, and lead.

40 CFR Part 51 sets out requirements for the preparation, adoption, and submittal of state implementation plans. These requirements mandate that any such plan shall include several provisions, including those summarized below.

Subpart G (Control Strategy) specifies the description of control measures and schedules for implementation, the description of emissions reductions estimates sufficient to attain and maintain the standards, time periods for demonstrations of the control strategy's adequacy, an emissions inventory, an air quality data summary, data availability, special requirements for lead emissions, stack height provisions, and intermittent control systems.

Subpart K (Source Surveillance) specifies procedures for emissions reports and record-keeping, procedures for testing, inspection, enforcement, and complaints, transportation control measures, and procedures for continuous emissions monitoring.

Subpart L (Legal Authority) specifies the requirements for legal authority to implement plans.

Section 51.230 under Subpart L specifies that each state implementation plan must show that the state has the legal authority to carry out the plan, including the authority to perform the following actions:

- (1) adopt emission standards and limitations and any other measures necessary for the attainment and maintenance of the national ambient air quality standards;
- (2) enforce applicable laws, regulations, and standards, and seek injunctive relief;
- (3) abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons;
- (4) prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of a national standard;
- (5) obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require record-keeping and to make inspections and conduct tests of air pollution sources;
- (6) require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the state on the nature and amounts of emissions from such stationary sources; and
- (7) make emissions data available to the public as reported and as correlated with any applicable emission standards or limitations.

Section 51.231 under Subpart L requires the identification of legal authority as follows:

- (1) the provisions of law or regulation which the state determines provide the authorities required under this section must be specifically identified, and copies of such laws or regulations must be submitted with the plan; and
- (2) the plan must show that the legal authorities specified in this subpart are available to the state at the time of submission of the plan.

Subpart N (Compliance Schedules) specifies legally enforceable compliance schedules, final compliance schedule dates, and conditions for extensions beyond one year.

Part D describes how nonattainment areas are established, classified, and required to meet attainment. Subpart 1 provides the overall framework of what nonattainment plans are to contain, while Subpart 2 provides more detail on what is required of areas designated nonattainment for ozone.

Section 171 defines "reasonable further progress," "nonattainment area," "lowest achievable emission rate," and "modification."

Section 172(a) authorizes EPA to classify nonattainment areas for the purpose of assigning attainment dates. Section 172(b) authorizes EPA to establish schedules for the submission of plans designed to achieve attainment by the specified dates. Section 172(c) specifies the provisions to be included in each attainment plan, as follows:

(1) the implementation of all reasonably available control measures as expeditiously as practicable and shall provide for the attainment of the national ambient air quality standards;

(2) the requirement of reasonable further progress;

(3) a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutants in the nonattainment area;

(4) an identification and quantification of allowable emissions from the construction and modification of new and modified major stationary sources in the nonattainment area;

(5) the requirement for permits for the construction and operations of new and modified major stationary sources in the nonattainment area;

(6) the inclusion of enforceable emission limitations and such other control measures (including economic incentives such as fees, marketable permits, and auctions of emission rights) as well as schedules for compliance;

(7) if applicable, the proposal of equivalent modeling, emission inventory, or planning procedures; and

(8) the inclusion of specific contingency measures to be undertaken if the nonattainment area fails to make reasonable further progress or to attain the national ambient air quality standards by the attainment date.

Section 172(d) requires that attainment plans be revised if EPA finds inadequacies. Section 172(e) authorizes the issuance of requirements for nonattainment areas in the event of a relaxation of any national ambient air quality standard. Such requirements shall provide for controls which are not less stringent than the controls applicable to these same areas before such relaxation.

Section 107(d)(3)(D) provides that a state may petition EPA to redesignate a nonattainment area as attainment and EPA may approve the redesignation subject to certain criteria being met. Section 107(d)(3)(E) stipulates one of these criteria, that EPA must fully approve a maintenance plan that meets the requirements of § 175A.

According to § 175A(a), the maintenance plan must be part of a SIP submission, and must provide for maintenance of the NAAQS for at least 10 years after the redesignation. The plan must contain any additional measures, as needed, to ensure maintenance. Section 175A(b) further requires that 8 years after redesignation, a maintenance plan for the next 10 years must then be submitted. As stated in § 175A(c), nonattainment requirements continue to apply until the SIP submittal is approved. Finally, § 175A(d) requires that the maintenance plan contain contingency provisions which will be implemented should the area fail to maintain the NAAQS as provided for in the original plan.

Under Part D, Subpart 2, § 181 sets forth the classifications and nonattainment dates for 1-hour ozone nonattainment areas once they are designated as such under § 107(d).

Section 182(a)(2)(A) requires that the existing regulatory program requiring reasonably available control technology (RACT) for stationary sources of volatile organic compounds (VOCs) in marginal nonattainment areas be corrected by May 15, 1991, to meet the minimum requirements in existence prior to the enactment of the 1990 amendments. RACT is the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. EPA has published control technology guidelines (CTGs) for various types of sources, thereby defining the minimum acceptable control measure or RACT for a particular source type.

Section 182(b) requires stationary sources in moderate nonattainment areas to comply with the requirements for sources in marginal nonattainment areas. The additional, more comprehensive control measures in §182(b)(2)(A) require that each category of VOC sources employ RACT if the source is covered by a CTG document issued between enactment of the 1990 amendments and the attainment date for the nonattainment area. Section 182(b)(2)(B) requires that existing stationary sources emitting VOCs for which a CTG existed prior to adoption of the 1990 amendments also employ RACT.

Section 182(c) requires stationary sources in serious nonattainment areas to comply with the requirements for sources in both marginal and moderate nonattainment areas.

Section 182(d) requires stationary sources in severe nonattainment areas to comply with the requirements for sources in marginal, moderate and serious nonattainment areas.

Section 182(f) extends the requirements for the control of VOC emissions to emissions of NOx.

40 CFR Part 81 specifies the designations of areas made under § 107(d) of the CAA and the associated nonattainment classification (if any) under § 181 of the CAA or 40 CFR 51.903(a), as applicable.

EPA has issued detailed guidance that sets out its preliminary views on the implementation of the air quality planning requirements applicable to nonattainment areas. This guidance is titled the "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (or "General Preamble"). See 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992). The General Preamble has been supplemented with further guidance on Title I requirements. See 57 FR 55621 (Nov. 25, 1992) (guidance on NOx RACT requirements in ozone nonattainment areas). For this subject, the guidance provides little more than a summary and reiteration of the provisions of the Act.

On June 21, 2001, EPA issued formal guidelines for the "Ozone Flex Program." These guidelines set out eligibility requirements, what measures may be taken and how, and how localities, states and EPA are to develop and implement early reduction plans. On November 14, 2002, EPA issued a schedule for 8-hour ozone designations and its effect on early action compacts for potential 8-hour nonattainment areas.

40 CFR Part 51, Subpart X, contains the provisions for the implementation of the 8-hour ozone NAAQS, along with the associated planning requirements. Specifically, 40 CFR 51.903(a) sets forth the classification criteria and nonattainment dates for 8-hour ozone nonattainment areas once they are designated as such under 40 CFR Part 81.

### State Requirements

These specific regulations are not required by state mandate. Rather, Virginia's Air Pollution Control Law gives the State Air Pollution Control Board the discretionary authority to promulgate regulations "abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth" (§ 10.1-1308). The law defines such air pollution as "the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to

property, or which unreasonably interfere with the enjoyment by the people of life or property" (§ 10.1-1300).

Specifically, § 10.1-1308 provides that the board shall have the power to promulgate regulations abating, controlling, and prohibiting air pollution throughout or in any part of the Commonwealth in accordance with the provisions of the Administrative Process Act. It further provides that no such regulation shall prohibit the burning of leaves from trees by persons on property where they reside if the local governing body of the county, city or town has enacted an otherwise valid ordinance regulating such burning.

## Need

*Please explain the need for the new or amended regulation and the potential consequences that may result in the absence of the regulation. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal, environmental benefits of the proposal, and the problems the proposal is intended to solve.*

### Identification of Specific Planning Requirements Establishing the Need

Ozone is formed by complex series of reactions between nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs) under the influence of solar ultraviolet radiation (sunlight). Ozone shows a very strong diurnal (daily) and seasonal (April to October) cyclical character. Ozone injures vegetation, has adverse effects on materials (rubber and fabrics), and is a pulmonary irritant that affects respiratory mucous membranes, lung tissues, and respiratory functions.

Open burning is a source of both NO<sub>x</sub> and VOCs. Virginia's open burning rule was thus developed to address both a public welfare problem and a public health problem. The regulation has proven essential in managing the frequent open burning conducted throughout the Commonwealth, particularly in rural and suburban areas.

The original ozone air quality standard that was the focus of air quality planning requirements after the promulgation of the 1990 Amendments to the Clean Air Act was a 1-hour standard. Since then, EPA has promulgated a new 8-hour ozone air quality standard. Air quality planning efforts to address compliance with the new 8-hour standard are in the early stages. On April 15, 2004, EPA has promulgated its decision as to the 8-hour nonattainment areas and some of the planning requirements, but the final decision regarding the remainder of the planning requirements will not be made known until mid-August 2004. The state regulations established VOC and NO<sub>x</sub> emissions control areas to provide the legal mechanism to define the geographic areas in which Virginia implements control measures to attain and maintain the air quality standards for ozone. The emissions control areas may or may not coincide with the nonattainment areas, depending on the necessity of the planning requirements.

Three areas of Virginia were originally established as VOC and NO<sub>x</sub> emissions control areas: Northern Virginia, Hampton Roads, and Richmond. These three VOC and NO<sub>x</sub> emissions control areas were established in order to implement control measures to attain the 1-hour ozone air quality standard. The Northern Virginia area remains out of compliance with the 1-hour standard and designated nonattainment for the 1-hour ozone standard; the area was recently reclassified to a severe classification. Furthermore, it was designated nonattainment for the 8-hour ozone standard. However, both the Hampton Roads and Richmond areas are in compliance with the 1-hour standard and are designated maintenance areas but were also designated nonattainment for the 8-hour standard. Promulgation of the 8-hour nonattainment areas resulted in some additional nonattainment areas as follows: Frederick County area, Fredericksburg area, and Roanoke area.

The Northern Virginia VOC and NO<sub>x</sub> Emissions Control Area currently consists of the counties of Arlington, Fairfax, Loudoun, Prince William, and Stafford; and the cities of Alexandria, Fairfax, Falls

Church, Manassas, and Manassas Park. No localities need to be added to the area as a result of the promulgation of the 8-hour ozone nonattainment areas. The Richmond VOC and NOx Emissions Control Area currently consists of the counties of Charles City, Chesterfield, Hanover, and Henrico; and the cities of Colonial Heights, Hopewell, and Richmond. The following new localities need to be added to the area as a result of the promulgation of the 8-hour ozone nonattainment areas: Petersburg City and Prince George County. The Hampton Roads VOC and NOx Emissions Control Area currently consists of the counties of James City and York; and the cities of Chesapeake, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg. The following new localities need to be added to the area as a result of the promulgation of the 8-hour ozone nonattainment areas: Gloucester County and Isle of Wight County.

Recently, a new VOC and NOx emissions control area was established: the Western Virginia Area. This area was designated nonattainment for the 8-hour ozone standard but was added to the list of VOC and NOx emissions control areas prior to EPA's final decision regarding the 8-hour nonattainment areas. This was done so the affected localities could participate in EPA's Early Action Compact program. The Western Virginia VOC and NOx Emissions Control Area includes the counties of Botetourt, Frederick and Roanoke; and the cities of Roanoke, Salem, and Winchester.

One more VOC and NOx emissions control area will need to be established: the Fredericksburg Area. This area was designated nonattainment for the 8-hour ozone standard. The Fredericksburg VOC Emissions Control Area would include Spotsylvania County and Fredericksburg City.

Thus, the amendment of the rule is to make legally enforceable one of several control measures identified in and designed to implement a plan submitted by the Commonwealth on February 25, 2004 for the attainment and maintenance of the ozone air quality standard in the Northern Virginia area. The plan was approved by the Metropolitan Washington Air Quality Committee (MWAQC) on February 19, 2004 and is entitled: Plan to Improve Air Quality in the Washington, DC-MD-VA Region (Severe Area SIP). MWAQC is the entity certified by the mayor of the District of Columbia and the governors of Maryland and Virginia to prepare an air quality plan for the DC-MD-VA Metropolitan Statistical Area under Section 174 of the federal Clean Air Act Amendments of 1990. The plan may be viewed at the following location:

<http://www.mwcog.org/environment/air/>

For the remaining areas that have been designated nonattainment for the 8-hour ozone standard, the amendment of the rule is to make legally enforceable one of several control measures to be included plans for the attainment and maintenance of the ozone air quality standard in those areas. This regulatory action is thus essential to protect the health, safety, and welfare of citizens.

#### General Planning Requirements

Among the primary goals of the federal Clean Air Act are the attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) and the prevention of significant deterioration (PSD) of air quality in areas cleaner than the NAAQS.

The NAAQS, developed and promulgated by the U.S. Environmental Protection Agency (EPA), establish the maximum limits of pollutants that are permitted in the outside ambient air. EPA requires that each state submit a plan (called a State Implementation Plan or SIP), including any laws and regulations necessary to enforce the plan, that shows how the air pollution concentrations will be reduced to levels at or below these standards (attainment). Once the pollution levels are within the standards, the SIP must also demonstrate how the state will maintain the air pollution concentrations at the reduced levels (maintenance).

The PSD program is designed to protect air quality in areas where the air is cleaner than required by the NAAQS. The program has three classifications for defining the level of allowable degradation: Class I is

the most stringent classification, allowing for little additional pollution, while Class III allows the most. All of Virginia is classified at the moderate level, Class II, with the exception of two Class I federal lands.

A SIP is the key to the state's air quality programs. The Clean Air Act is specific concerning the elements required for an acceptable SIP. If a state does not prepare such a plan, or EPA does not approve a submitted plan, then EPA itself is empowered to take the necessary actions to attain and maintain the air quality standards--that is, it would have to promulgate and implement an air quality plan for that state. EPA is also, by law, required to impose sanctions in cases where there is no approved plan or the plan is not being implemented, the sanctions consisting of loss of federal funds for highways and other projects and/or more restrictive requirements for new industry. Generally, the plan is revised, as needed, based upon changes in the federal Clean Air Act and associated EPA regulations and policies.

The basic approach to developing a SIP is to examine air quality across the state, delineate areas where air quality needs improvement, determine the degree of improvement necessary, inventory the sources contributing to the problem, develop a control strategy to reduce emissions from contributing sources enough to bring about attainment of the air quality standards, implement the strategy, and take the steps necessary to ensure that the air quality standards are not violated in the future.

The heart of the SIP is the control strategy. The control strategy describes the emission reduction measures to be used by the state to attain and maintain the air quality standards. There are three basic types of measures: stationary source control measures, mobile source control measures, and transportation source control measures. Stationary source control measures are directed at limiting emissions primarily from commercial/industrial facilities and operations and include the following: emission limits, control technology requirements, preconstruction permit programs for new industry and expansions, and source-specific control requirements. Stationary source control measures also include area source control measures which are directed at small businesses and consumer activities. Mobile source control measures are directed at tailpipe and other emissions primarily from motor vehicles and include the following: Federal Motor Vehicle Emission Standards, fuel volatility limits, reformulated gasoline, emissions control system anti-tampering programs, and inspection and maintenance programs. Transportation source control measures limit the location and use of motor vehicles and include the following: carpools, special bus lanes, rapid transit systems, commuter park and ride lots, bicycle lanes, signal system improvements, and many others.

Federal guidance on states' approaches to the inclusion of control measures in the SIP has varied considerably over the years, ranging from very general in the early years of the Clean Air Act to very specific in more recent years. Many regulatory requirements were adopted in the 1970s when no detailed guidance existed. The legally binding federal mandate for these regulations is general, not specific, consisting of the Clean Air Act's broad-based directive to states to attain and maintain the air quality standards. However, in recent years, the Clean Air Act, along with EPA regulations and policy, has become much more specific, thereby removing much of the states' discretion to craft their own air quality control programs.

Generally, a SIP is revised, as needed, based upon changes in air quality or statutory requirements. For the most part the SIP has worked, and the standards have been attained for most pollutants in most areas. However, attainment of NAAQS for one pollutant--ozone--has proven problematic. While ozone is needed at the earth's outer atmospheric layer to shield out harmful rays from the sun, excess concentrations at the surface have an adverse effect on human health and welfare. Ozone is formed by a chemical reaction between volatile organic compounds (VOCs), nitrogen oxides (NOx), and sunlight. When VOC and NOx emissions from mobile sources and stationary sources are reduced, ozone is reduced.

Congress enacted the 1977 Amendments to the Clean Air Act in order to address unsuccessful SIPs and areas that had not attained the NAAQS (that is, nonattainment areas). Although SIP revisions submitted pursuant to the requirements of the 1977 amendments did achieve some progress in eliminating nonattainment areas, some areas remained.

In 1990 Congress once again enacted comprehensive amendments to the Act to address SIP requirements for nonattainment areas. The new Act established a process for evaluating the air quality in each region and identifying and classifying each nonattainment area according to the severity of its air pollution problem. Nonattainment areas are classified as marginal, moderate, serious, severe and extreme. Marginal areas are subject to the least stringent requirements and each subsequent classification (or class) is subject to successively more stringent control measures. Areas in a higher classification of nonattainment must meet the mandates of the lower classifications plus the more stringent requirements of their class. In addition to the general SIP-related sanctions, nonattainment areas have their own unique sanctions. If a particular area fails to attain the federal standard by the legislatively mandated attainment date, EPA is required to reassign it to the next higher classification level (denoting a worse air quality problem), thus subjecting the area to more stringent air pollution control requirements. The Clean Air Act includes specific provisions requiring these sanctions to be issued by EPA if so warranted.

The new Act required EPA, based on the air quality data from each state, to propose geographic boundaries and pollution classification levels for all nonattainment areas to each state's governor. If states disagreed with EPA's proposals, they had the opportunity to propose different boundaries; however, EPA had the authority to make the final decision.

The process provided in the new Act yielded three nonattainment areas for Virginia for the 1-hour ozone air quality standard. The classifications for Virginia's nonattainment areas were marginal for the Hampton Roads Nonattainment Area, moderate for the Richmond Nonattainment Area, and serious for the Northern Virginia Nonattainment Area. Since that time, air quality has improved in some areas. Richmond and Hampton Roads have achieved the 1-hour ozone standard and are now considered maintenance areas; that is specific strategies that were implemented must continue, however, no additional new requirements are necessary provided the areas do not measure ozone concentrations in levels high enough to reclassify them into nonattainment. Meanwhile, Northern Virginia continues to experience difficulty in attaining the 1-hour standard and remains a nonattainment area. Although initially classified as serious, the Northern Virginia Ozone Nonattainment Area is now classified as severe because it failed to attain the 1-hour ozone air quality standard by the legislatively mandated attainment date for serious areas.

The original ozone air quality standard that was the focus of air quality planning requirements after the promulgation of the 1990 Amendments to the Clean Air Act was a 1-hour standard (0.12 ppm). Since then, EPA has promulgated a new 8-hour ozone air quality standard (0.08 ppm). Air quality planning efforts to address compliance with the new 8-hour standard are in the early stages. On April 15, 2004, EPA has promulgated its decision as to the 8-hour nonattainment areas and some of the planning requirements. Also, EPA hopes to finalize the remainder of the air quality planning requirements by mid-August 2004, so that states can begin to develop their implementation plans. Promulgation of the 8-hour nonattainment areas resulted in some additional areas (with classifications) as follows: Frederick County Nonattainment Area, Fredericksburg Nonattainment Area, and Roanoke Nonattainment Area. The Frederick County Nonattainment Area and Roanoke Nonattainment Area are classified as basic areas and the effective date of the nonattainment designation has been delayed because the affected localities volunteered to participate in the Early Action Compact program (see below). The Fredericksburg Nonattainment Area is classified moderate.

EPA has established the Early Action Compact program to allow areas that may potentially become designated nonattainment under the 8-hour ozone standard to voluntarily adopt local emission control programs to avoid air quality violations and the potential of mandated controls. By avoiding the nonattainment designation, these areas will avoid new source review for major sources, including the requirement to make offsets, and conformity review. These areas will also experience a reduction in ozone air pollution, and thus experience improved public health and welfare.

Once the nonattainment areas are defined, each state is then obligated to submit a SIP demonstrating how it will attain the air quality standards in each nonattainment area. First, the Act requires that certain specific control measures and other requirements be adopted and included in the SIP; a list of those that

necessitates the adoption or modification of state regulations is provided below. In addition for moderate nonattainment areas, the state has to demonstrate that it would achieve a VOC emission reduction of 15% within 6 years of the base year. Finally for serious nonattainment areas, the SIP has to include an attainment demonstration by photochemical modeling (including annual emission reductions of 3% for years 7 to 9 beyond the base year) in addition to the 15% emission reduction demonstration. In cases where the specific control measures shown below are inadequate to achieve the emission reductions or attain the air quality standard, the state is obligated to adopt other control measures as necessary to achieve this end.

#### ALL AREAS

- correct existing VOC regulatory program (controls on certain sources identified in EPA control technology guidelines)
- requirement for annual statements of emissions from industries
- preconstruction review (permit) program for new industry and expansions (with variable major source definition, variable offset ratio for addition of new pollution, and special requirements for expansions to existing industry in serious areas)
- offset ratio for addition of new pollution of 1.1 to 1
- procedures to determine if systems level highway plans and other federally financed projects are in conformity with air quality plans

#### MODERATE AND ABOVE AREAS

- requirement for controls for all VOC sources identified in EPA control technology guidelines
- case by case control technology determinations for all major VOC and NOX sources not covered by a EPA control technology guideline
- requirement for controls for all major (100 tons per year) VOC sources
- requirement for controls for all major (100 tons per year) NOX sources
- offset ratio for addition of new pollution of 1.15 to 1
- requirement for vapor recovery controls for emissions from filling vehicles with gasoline (stage II)
- basic motor vehicle emissions inspection and maintenance program

#### SERIOUS AND ABOVE AREAS

- requirement for controls for all major (50 tons per year) VOC sources
- requirement for controls for all major (50 tons per year) NOx sources
- offset ratio for addition of new pollution of 1.2 to 1
- enhanced monitoring (source emissions) program
- correct existing motor vehicle emissions inspection and maintenance (I&M) program
- enhanced motor vehicle emissions I&M program
- clean fuel fleet vehicle program
- oxygenated fuels program

#### SEVERE AND ABOVE AREAS

- requirement for controls for all major (25 tons per year) VOC sources
- requirement for controls for all major (25 tons per year) NOx sources
- offset ratio for addition of new pollution of 1.3 to 1
- requirement for major sources to pay a penalty fee if area does not attain air quality standard by attainment date
- transportation control strategies and measures to offset emissions growth from VMT

Once an area is eligible to be redesignated as attainment, the state must submit to EPA an attainment demonstration and a maintenance plan for approval. The maintenance plan must contain controls and

measures sufficient to ensure that the air quality of the area will be maintained for the next 10 year period while accommodating expected growth. The maintenance plan must also contain contingency measures that will be implemented should the area fail to maintain the ambient air quality standard using the control measures provided in the plan. Virginia has submitted, and EPA has approved, an attainment redesignation request and a maintenance plan for the Fredericksburg Nonattainment Area (70 FR 76165, December 23, 2005). Extension of the seasonal burning restriction of Article 40 of Chapter 40 into the Fredericksburg VOC Emissions Control Area was among those measures necessary to accommodate the maintenance plan, and is, therefore, required as a condition of EPA's approval of the redesignation of the Fredericksburg area as attainment.

Since the Richmond and Hampton Roads Ozone Nonattainment Areas have also met the air quality standards necessary for redesignation, Virginia will be submitting a 10-year air quality maintenance plan to support redesignation requests for those areas. Accordingly, the use of the seasonal burning restriction has been determined to be necessary for implementation within the Richmond and Hampton Roads VOC Emissions Control Areas.

### Impact on Family

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: (1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; (2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; (3) strengthen or erode the marital commitment; and (4) increase or decrease disposable family income.*

It is not anticipated that these regulation amendments will have a direct impact on families. However, there will be positive indirect impacts in that the regulation amendments will ensure that the Commonwealth's air pollution control regulations will function as effectively as possible, thus contributing to reductions in related health and welfare problems.

**COMMONWEALTH OF VIRGINIA**  
**STATE AIR POLLUTION CONTROL BOARD**  
**SUMMARY AND ANALYSIS OF PUBLIC TESTIMONY FOR**  
**REGULATION REVISION H03**  
**CONCERNING**

**Open Burning**

**(9 VAC 5 CHAPTER 40)**

**INTRODUCTION**

At the March 2005 meeting, the Board authorized the Department to promulgate for public comment a proposed regulation revision concerning open burning.

A public hearing was advertised accordingly and held in Richmond on January 12, 2006 and the public comment period closed on January 30, 2006. The proposed regulation amendments subject to the hearing are summarized below followed by a summary of the public participation process and an analysis of the public testimony, along with the basis for the decision of the Board.

**SUMMARY OF PROPOSED AMENDMENTS**

The proposed regulation amendments concerned provisions covering open burning. A summary of the amendments follows:

1. Prohibit the use of special incineration devices during the summer burning ban. (A special incineration device is a pit incinerator, conical or teepee burner, or any other device specifically designed to provide good combustion performance.)
2. Expand the summer burning ban from three months to five.
3. Expand the summer ban into the new volatile organic compound emissions control areas.
4. Resolved definition conflicts between the regulations of the Waste Management Board and this regulation.
5. Integrated air curtain destructor requirements with incinerator rules of the Board.

## SUMMARY OF PUBLIC PARTICIPATION PROCESS

A public hearing was held in Richmond, Virginia on January 12, 2006. No persons attended the hearing and four additional written comments were received during the public comment period. As required by law, notice of this hearing was given to the public on or about November 28, 2005 in the Virginia Register and in seven major newspapers (one in each Air Quality Control Region) throughout the Commonwealth. In addition, personal notice of this hearing and the opportunity to comment was given by mail to those persons on the Department's list to receive notices of proposed regulation revisions.

## ANALYSIS OF TESTIMONY

Below is a summary of each person's testimony and the accompanying analysis. Included is a brief statement of the subject, the identification of the commenter, the text of the comment and the Board's response (analysis and action taken). Each issue is discussed in light of all of the comments received that affect that issue. The Board has reviewed the comments and developed a specific response based on its evaluation of the issue raised. The Board's action is based on consideration of the overall goals and objectives of the air quality program and the intended purpose of the regulation.

1. **SUBJECT**: Statewide ban on open burning.

**COMMENTER**: Melinda Wheeler, Lynchburg VA

**TEXT**: Ms. Wheeler indicated that she would be in favor of a statewide ban of open burning. The smoke generated by the burning of leaves conducted by her neighbors that burn in Lynchburg causes her great distress. There is smoke in her yard and house. It exacerbates her allergies and causes headaches, irritated eyes and has, on occasion, required that she take time off from work.

**RESPONSE**: The General Assembly of Virginia has determined a policy to permit open burning for the burning of leaves. Section 10.1-1308 A of the Code of Virginia specifically states... "No such regulation shall prohibit the burning of leaves from trees by persons on property where they reside if the local governing body of the county, city, or town has enacted an otherwise valid ordinance regulating such burning." In addition to expanding the burning ban to the entire ozone season (May through September) the current open burning regulation contains a model ordinance that local governments may follow to enact requirements and ordinances that are compatible with the state provisions. Any local government may ban open burning; many localities and communities within the Commonwealth have done so. There is nothing to prevent the city of Lynchburg from doing that as well. No changes have been made to the proposal based on this comment.

2. **SUBJECT**: Statewide ban on open burning.

**COMMENTER**: Wendy Harper, Lynchburg, VA.

**TEXT**: Ms. Harper indicated that she would be in favor of any increase or statewide ban of open burning. The smoke generated by the burning of leaves conducted by her neighbors that burn in Lynchburg causes her great distress and has, on occasion, required emergency room treatment for her asthma.

**RESPONSE**: See response to #1 above. No changes have been made to the proposal based on this comment.

3. **SUBJECT**: Prohibition of open burning; statewide ban.

**COMMENTER:** W. Keith Brower, Jr. Chief Fire Marshal, Loudoun Co., VA.

**TEXT:** The proposed changes are good in that they move toward a full ban on burning. The development industry may have problems due to additional limits to their land clearing operations.

**RESPONSE:** See response to #1 above. No changes have been made to the proposal based on this comment.

4. **SUBJECT:** Prescribed burning by the United States Forest Service.

**COMMENTER:** Glen Stapleton, U.S. Forest Service

**TEXT:** The Forest Service (Service) is concerned that the ban from May through September in newly designated Volatile Organic Compound (VOC) control areas will impact the Service's ability to conduct its fire management program and prescribed burning to reduce hazardous build up of fuels. The ban has not been a problem in the past because it was of a shorter duration (only June, July and August) and the Service didn't have any forests in the VOC control areas. With the expansion of additional months and geographic areas it is now impacting the Service. It is recommended that the forest service be exempt from the ban with the stipulation that burning would not occur on days with forecasted high ozone levels. This would allow more flexibility for their fire management program.

**RESPONSE:** Subdivisions 1 through 10 under 9 VAC 5-40-5630, permissible open burning, are intended to be stand alone provisions detailing specific situations where burning is permitted. They are not to be interpreted as affecting one another nor connected to each other. Therefore, the prohibition from burning during the ozone season is only intended for burning situations identified in subdivision 8; clean burning waste and debris waste resulting from property maintenance, from the development or modification of roads and highways, parking areas, railroad tracks, pipelines, power and communication lines, buildings or building areas, sanitary landfills, or from any other clearing operations. The ban was never intended to be interpreted as applying to forest management practices or agricultural practices or any other permissible burning listed in this section. The clarifying language which was previously struck through has been restored for clarity.

5. **SUBJECT:** Expansion of ban from three to five months.

**COMMENTER:** W. Keith Brower, Jr., Chief Fire Marshal, Loudoun Co., VA.

**TEXT:** Adding May and September may result in a loss of revenue of between \$500-\$1000; however, this is more than offset due to the benefits of the ban.

**RESPONSE:** The comments are appreciated. No changes have been made to the proposal based on this comment.

6. **SUBJECT:** Perceived conflict with section 10.1-1308 of the Code of Virginia.

**COMMENTER:** W. Keith Brower, Jr., Chief Fire Marshal, Loudoun Co., VA.

**TEXT:** There is still a problem that relates to the disposal of leaves and yard trimmings. The public may become upset due to the restrictions under section 10.1-1142 (known as the "4:00 p.m. law") which prohibits burning from February 15 through April 30 until after 4:00 p.m. Many owners wait until May 1 to start burning due to the restrictions imposed during the 4:00 p.m. law and I predict public opposition to extending the ban to include May.

**RESPONSE:** The public was given opportunity to comment on the proposed changes. No comments from the general public have been received in opposition to the extension of the ban to include the months of May and September. In fact, comments received indicate the desire for a statewide, permanent ban. No changes have been made to the proposal based on this comment.

7. **SUBJECT**: Perceived conflict with section 10.1-1308 of the Code of Virginia.

**COMMENTER**: W. Keith Brower, Jr., Chief Fire Marshal, Loudoun Co., VA.

**TEXT**: Further, section 10.1-1308 of the Code of Virginia states that the burning of leaves is allowed on one's own property, unless a local regulation prohibits same. Please comment on this conflict as it is not clear how this meshes with the ban on open burning.

**RESPONSE**: Please see response to comment number 4. The ban is currently imposed during the summer months of June, July and August and is proposed to be extended through May and September only for specific types of burning as identified in subdivision 8 of 9 VAC 5-40-5630. The ban does not apply to homeowners. The only restriction for leaf burning is for homeowners living in areas where there is a valid ordinance that addresses the disposal of leaves according to section 10.1-1308 of the Code of Virginia. There is no conflict. No changes have been made to the proposal based on this comment.

8. **SUBJECT**: Definitions: "Built-up area", "urban area", and "non-urban".

**COMMENTER**: W. Keith Brower, Jr., Chief Fire Marshal, Loudoun Co., VA.

**TEXT**: I am concerned that the terms "built-up area", "urban area", and "non-urban" are very subjective and difficult to apply. There are development zones in Loudoun County that are in transition or have covenants to protect "green space" by way of cluster homes. In Loudoun County there is a development concept of the "rural village" that includes distinct areas of "urban" and "non-urban" all within the same development. There are cluster homes in one area and some lots in the five acre or greater that permit horses and cows. It is hard for enforcement to permit the gentleman farmer to burn his brush but tell his neighbor in the "built-up" area he can't burn. The "urban" "non-urban" concept should be clarified by way of agricultural zoning designations. This would create a very objective definition.

**RESPONSE**: Local governments are in a better position to determine the appropriate designations of where open burning may be appropriate or not within their jurisdictions. Zoning designations may be appropriate for Loudoun County, a county in "transition", but may be completely inappropriate for other counties throughout the Commonwealth. That is why the regulation contains a model rule to assist counties to develop their own ordinances to control open burning that is appropriate for each locality. It is unreasonable and inappropriate for a state regulation to attempt to cover all aspects of an issue for all localities, particularly given the diversity of development throughout the Commonwealth. Loudoun County has the authority and is encouraged to consider such local action as necessary to address the specific developmental needs facing it. No changes have been made to the proposal based on this comment.

9. **SUBJECT**: Expansion of summer ban into the new VOC control areas.

**COMMENTER**: W. Keith Brower, Jr., Chief Fire Marshal, Loudoun Co., VA.

**TEXT**: There is no impact here as Loudoun County has been in the Northern Virginia VOC control area for many years.

**RESPONSE**: The comment is appreciated. No changes have been made to the proposal based on this comment.

10. **SUBJECT**: Definition conflicts between the Air and Waste regulations.

**COMMENTER**: W. Keith Brower, Jr., Chief Fire Marshal, Loudoun Co., VA.

**TEXT:** Interagency cooperation is good thing and ensuring compatibility between air and waste regulations is to be commended. However, there is still difficulty in understand the meaning of the terms “clean wood”, “clean burning waste”, “commercial waste”, “construction waste”, and “debris waste”. It is suggested that one definition category be created for “waste” then have subdivisions for the other types of waste. This would aid the reader to better understand the difference between the various types of waste.

**RESPONSE:** Clarity of the regulation is important not only for the general public but for those who will need to enforce and explain the meaning of the regulations. The current changes to the definitions have been made specifically to ensure compatibility with the Department of Waste regulations and provide consistent enforcement of both waste and air program regulations. Any changes to the definitions would create the very inconsistencies between the two programs that we are attempting to correct. The public will be better served with similarly formatted definitions for regulations that address the disposal or destruction of material where regulations between air and waste overlap. No changes have been made to the proposal based on this comment.

11. **SUBJECT:** Trash pick-up and “collection service”

**COMMENTER:** W. Keith Brower, Jr., Chief Fire Marshal, Loudoun Co., VA.

**TEXT:** It has always been interoperated that in Loudoun County trash pick-up is always available either through contracting privately or having it provided through tax or homeowners association levy. Our interpretation (for 20+ years) has allowed my office to control the burning of household trash and to an extent the burning of leaves particularly in areas that would be considered “built-up”. Many areas of the County are not served by municipal refuse service. Instead, service is funded via homeowners association dues or private homeowner contract. The position by DEQ is that unless expressly prohibited in the homeowner covenants or the fire or solid waste code, it is perfectly legal for these citizens to burn their household trash and or leaves. I am appalled that such an interpretation could [be] issued from the very agency charged with protecting the environment. This point needs further review and regulations need to be strengthened to restrict burning, especially for household trash.

**RESPONSE:** The information provided by DEQ is based on the public policy determined by the General Assembly and codified in section 10.1-1308 in the Code of Virginia. The legislature addressed the issue of permitting the citizens of the Commonwealth to burn leaves and specifically indicated that “no such regulation shall prohibit the burning of leaves...if the local governing body of the county, city or town has enacted an otherwise valid ordinance regulating such burning”. The intent of the legislature is clear that local governments, not state rules, need to address such local issues. If regulations to control and enforce open burning in Loudoun County need to be strengthened it is well within the preview of the local government to do that. In fact, is not only encouraged but required by state law that local governments address open burning issues because, by law, the Board is prohibited from doing so. No changes have been made to the proposal based on this comment.

12. **SUBJECT:** Regulations need to include a reference to the Statewide Fire Prevention Code (SFPC).

**COMMENTER:** W. Keith Brower, Jr., Chief Fire Marshal, Loudoun Co., VA.

**TEXT:** The State Forestry laws are specifically mentioned and play a big role in the local regulation of open burning. Likewise, there is important language in the State Fire Prevention Code (SFPC) that restricts all burning that is hazardous or done when atmospheric conditions warrant (Section 302.2.2). The public should know about this as much as the “4:00 p.m. law” as the local fire official uses this to ban burning during extreme dry conditions. Further, the SFPC conveys permitting regulations for open burning that may be imposed at the local level.

**RESPONSE:** The comment is appreciated. Review of the SFPC and discussions with the State Deputy Fire Marshall do not indicate that a conflict is present nor is it necessary to reference the

SFPC. In fact, referencing the SFPC may cause more confusion because the Board's open burning regulations are more comprehensive and, in most cases, is more stringent than the SFPC. Local governments have the authority to adopt more stringent regulations than both the Board's open burning regulation or the SFPC and are encouraged to do so to address specific local needs and issues. No changes have been made to the proposal based on this comment.

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